In the

Supreme Court of the United States

October Term 1958

No. 38

RAILWAY EXPRESS AGENCY, INCORPORATED,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

Appeal from the Supreme Court of Appeals of Virginia

MOTION TO DISMISS

and

BRIEF OF APPELLEE IN SUPPORT OF THE MOTION TO DISMISS

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MOTION TO DISMISS

The Commonwealth of Virginia respectfully moves that the Court dismiss the appeal in the above entitled case on the ground that neither of the questions involved presents a

substantial federal question, and that the judgment on the second question rests on an adequate non-federal basis.

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BRIEF OF APPELLEE IN SUPPORT OF THE MOTION TO DISMISS

The appellee, believing that the matters set forth herein will demonstrate the lack of substance in the questions presented by this appeal, files this statement in opposition to the appellant's Statement as to Jurisdiction, and includes herein its brief in support of the Motion to Dismiss the appeal.

I.

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A.

The Statute

The appellant contends that Section 58-546 and Section 58-547 of the Code of Virginia, which authorize the levying of a franchise tax on express companies in lieu of taxes upon all other intangible property, and in lieu of property taxes on rolling stock of such companies, are invalid under the Commerce Clause of the Constitution of the United States. These sections are found in Article 4 of Chapter 12, Title 58 of the Code of Virginia. Other sections are important to a consideration of this matter and the whole of Article 4, Chapter 12, Title 58 of the Code of Virginia, as amended, is printed as an appendix to the Statement as to Jurisdiction, but for the convenience of the Court, § 58-546 and § 58-547 are as follows:

> "§ 58-546. Franchise tax on express companies.—Each express company doing business in this State shall, on or before the first day of June of each year, pay to the State a franchise tax which shall be in lieu of taxes upon all of its other intangible property and in lieu of property taxes on its rolling stock.

"§ 58-547. Amount of franchise tax. — The franchise tax shall be equal to two and three-twentieths per cent of the gross receipts derived from operations within this State. If its operations are partly within and partly without this State, the gross receipts derived from operations within this State shall be deemed to be all receipts on business beginning and ending within this State and all receipts derived from the transportation within this State of express transported through, into, or out of this State."

B.

The Proceedings Below

The case involves an application of the Railway Express Agency, Incorporated, a Delaware corporation, hereinafter referred to as "appellant", as distinguished from the Railway Express Agency, Incorporated, of Virginia, which is referred to herein as the "Virginia Company". This application was for the correction of the assessment of taxes for the year 1956 made by the State Corporation Commission of Virginia in accordance with §§ 58-546 and 58-547, *et seq.*, of the Code of Virginia, and for refund of such taxes. The State Corporation Commission denied the refund by order entered on March 1, 1957, and from that order the appellant appealed as a matter of right to the Supreme Court of Appeals of Virginia.

The Supreme Court of Appeals of Virginia, by order and opinion dated December 2, 1957, and reported in 199 Va. 589, held that the tax in question is a property tax not prohibited by the Commerce Clause or any other clause of the Constitution of the United States, and validly imposed by the aforesaid amended sections of the Virginia Code.

C.

Statement of the Case

The appellee believes that the Statement of the Case included in the Statement as to Jurisdiction requires amplification, and that in several respects it is in error.

By way of amplification, it is important to note that the evidence in this case reveals without contradiction that, even though the appellant may not be *directly* engaged in intrastate commerce in Virginia, *the property owned by it in Virginia is used in intrastate commerce in Virginia, and for that use the appellant receives valuable consideration.* Further, it appears that the appellant has a contract with the Virginia Company, under the terms of which the Virginia Company is required to conduct the intrastate express transportation business in Virginia on the lines of fifteen (15) railroads, one (1) electric line, one (1) boat line and by motor vehicle as designated by appellant, and the *Virginia Company is obligated to perform the obligations of the appellant imposed by contracts between the appellant and such carriers concerning intrastate operations in Virginia.* The contract further provides that the appellant *shall furnish to the Virginia Company, or permit the use jointly with it by the Virginia Company, of such property, real and personal, as may be necessary in the conduct of business transacted by the Virginia Company.* The employees of the two companies are considered joint employees whenever necessary for the conduct of the business of the parties in Virginia. All revenue received by the Virginia Company is required to be transmitted to the appellant.

It is true that there appears in the Record a stipulation entered into prior to the hearing before the State Corporation Commission. It is to the effect that the appellant conducts only an interstate business in Virginia.

However, it should be noted that the appellant's evidence before the Commission reveals that the appellant has contracts with railroad companies giving it "exclusive express privileges", that the appellant has in turn contracted with Railway Express Agency, Incorporated, of Virginia, and under terms of the contract has, in effect, assigned to the Virginia Company its intrastate privileges in Virginia, the two companies use the same facilities, the same equipment, the same supplies, even the same bills of lading. The employees are "joint employees", and the Virginia Company transmits to the Delaware Company all its receipts. The Delaware Company pays or bears all costs or expenses, including all operating expenses of the Virginia Company. In other words, the appellant totally owns the Virginia Company, receives all its revenues and pays all its bills, and permits the Virginia Company to use the appellant's property in Virginia in intrastate commerce.

The following statements are by way of correction of the appellant's Statement of the Case.

The appellant states (p. 4) that prior to 1956 the Code of Virginia "* * * imposed an annual *license* tax on express companies *for the privilege of doing business* * * *". Further (p. 5), it says that the statute was amended and reenacted in 1956, and that the effect of the amendment "was to change the name but not the incidence of the tax". The Virginia Court found it to be a "different" tax, and so it is.

The 1956 amendments to the Virginia statute were vastly more than a change in the name of the statute. This Court had held in 347 U. S. 359 (1954) that the statutes then in force imposed a license tax for the privilege of doing solely an interstate business. Consistent with that determination, Virginia assessed no such taxes against the appellant in 1954 or 1955. In 1956, the Legislature, confronted with the fact that the existing license tax for the privilege of doing

business had been nullified as to this company, changed the nature of the tax and imposed a franchise tax on all express companies doing business in the State *in lieu of taxes upon all* their *other* intangible property, and in lieu of property taxes on their rolling stock. The tax was not called, and does not operate as, a license tax. The incidence of the tax is the increased value of the appellant's property as a going concern. The tax is not said to be, and does not operate as, a tax for the privilege of doing business in Virginia.

The appellant asserts that the manner in which the tax was determined denies it equal protection and due process of law. How was the tax determined? The appellant, in its 1956 return, reported, as to its receipts earned from business passing through, into or out of the State, that it had "NONE" and explained on the return that it had no way of determining such. As a result of this report, the State Corporation Commission of Virginia, acting under the statutory method provided, proceeded to determine the tax based on the "best and most reliable information" available (§58-549, Code of Virginia). The Record is devoid of any evidence as to the complexity or cost which would have been involved had the appellant chosen to keep the necessary records to supply the information required of it.

The statutory method of determining the tax was only used because appellant failed to report.

Appellant uses several involved mathematical comparisons in an attempt to show that the tax reaches property outside of the State of Virginia. On page 8 of the Statement as to Jurisdiction, it is said that it appears from the appellant's 1956 return that as to certain named classes of property it owned a total property value in Virginia on the taxable date of $458,565.16, and that from the same return the depreciated nationwide system values of the same classes

of company property were $79,700,426. Two comments are required:

(1) One of the classes listed is intangible personal property. The only value attributed to Virginia ownership in that category is $120,110.70 for money on deposit. NO VALUE IS ATTRIBUTED TO THE EXISTING CONTRACT WITH 177 RAILROADS BY WHICH THE APPELLANT OWNS THE EXCLUSIVE EXPRESS PRIVILEGES OVER SAID ROADS NATIONWIDE, INCLUDING LINES OPERATING IN VIRGINIA. Further, NO VALUE IS ATTRIBUTED TO TOTAL OWNERSHIP OF THE VIRGINIA COMPANY, NOR TO THE CONTRACT WITH THE VIRGINIA COMPANY PREVIOUSLY REFERRED TO HEREIN.

(2) The figure of $79,700,426 (nationwide system values) includes values for a class of property other than the classes listed for Virginia, and if limited to classes similar to those listed for Virginia would be reduced by $15,394,946.

II.

ARGUMENT

A.

The Tax Involved Is a Property Tax and No Substantial Federal Question Is Presented

1.

Judicial Interpretation of the Tax in Virginia

The constitutional and statutory provisions of the Commonwealth furnish a uniform plan for the assessment and

taxation of all public service corporations, providing first for the imposition of *ad valorem* taxes on tangible property by local authorities on the basis of valuation fixed by the State Corporation Commission. In making the assessment of the tangible property for local taxation, the Commission must and does *exclude* such franchise or going concern value as may be inherent in such property, and, as a result, the localities tax only the "bare bones" value, leaving, for the second part of the system, the intangible "going concern" value to be taxed by the State for the protection and services rendered by it.

The Supreme Court of Appeals of Virginia has found that "the statutes now under consideration fit into and 'mesh' with that scheme", and that the tax is in fact and effect a tax on intangible property which has great value and would otherwise be untaxed.

That this was the purpose and intent of the framers of the Virginia Constitution of 1902 is clear. (See, Debates, Constitutional Convention, 1901-2, Vol. II, p. 2857, or for excerpt therefrom see the opinion in this case of the Court below, 199 Va. 589, 597.)

It is also clear that the present holding of the Supreme Court of Appeals of Virginia is not for the purpose of classifying a tax to avoid rulings of this Court. In the case of *Railway Express Agency, Inc.* v. *Virginia*, 347 U. S. 359, the majority opinion acknowledged the fact that the Virginia Court's determination that the tax involved was a property tax was consistent with its earlier decisions, and the minority opinion expressly called attention to the fact that it was consistent with the earlier holdings of both the State Supreme Court and the State Corporation Commission, and that some of those decisions antedated *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602, 95 L. Ed.

573, 71 S. Ct. 508. (*Railway Express Agency, Inc.* v. *Virginia*, 347 U. S. 359, at pages 364 and 371.) See also *City of Richmond* v. *Commonwealth*, 188 Va. 600, 50 S. E. 2d 654 (1948); and *Commonwealth* v. *Baltimore Steam Packet Co.*, 193 Va. 55, 68 S. E. 2d 137.

The decision of the Court below in this case and the earlier Virginia decisions make it clear that:

(1) The tax is a property tax "in lieu" of taxes on other property.

(2) The "going concern value" of the corporation's property is not otherwise taxed in Virginia.

(3) The "going concern value" is not subjected to dual taxation for the tax is measured by fairly apportioned gross receipts.

2.

ADMINISTRATIVE INTERPRETATION IN VIRGINIA

The State Corporation Commission of Virginia has consistently administered the taxation of public service corporations in Virginia, including express companies, in such a manner that the physical properties are taxed by the localities as bare bones of the property, denuded of the intangible elements of value which may be attributed to them. The intangible or going concern value is treated as, and spoken of as, franchise value, and is only reached by the franchise tax measured by gross receipts. (See statement of former State Corporation Commissioner Epes quoted in *Commonwealth* v. *Baltimore Steam Packet Co., supra;* and see 1941 Annual Report of the State Corporation Commission as quoted in part in the *Baltimore Steam Packet Case*, 193 Va. 55, at page 70.)

3.

The Statute

In the prior case between these same parties (347 U. S. 359), this Court was divided five (5) to four (4). The majority opinion held that the Court would examine for itself the practical operation of the tax and said:

> "We start with the taxing statute in which the Legislature gave a trinity of characterizations to the tax. It was declared to be in addition to the 'property tax', not an additional property tax; it was named 'an annual license tax', and it was laid 'for the privilege of doing business in this State.' It is not an easy conclusion that the Legislature did not know the actual character of the tax it was laying or that it misconceived what it was taxing." (347 U. S. 364)

In conclusion, the Court said:

> "We think we can only regard this tax as being in fact and effect just what the Legislature said it was—a privilege tax, and one that cannot be applied to an exclusively interstate business." (347 U. S. 369)

In the dissenting opinion, it was made clear that the majority had based their decision mainly, if not solely, on the labels which the Virginia Legislature had applied. There it is said:

> "In sum, Virginia's tax should not be held unconstitutional merely because of the name the state's legislature gave it. Since no one asserts that the amount of the tax is unfair or discriminatory, presumably the same tax assessed under a different name by the use of different words would be upheld. The constitutionality of a state's tax laws should not depend on the ability of state legislatures to foresee what tax language would most likely meet this Court's approval." (347 U. S. 372)

The present taxing statute (§ 58-546) reads as follows:

> "Each express company doing business in this State shall, on or before the first day of June of each year, pay to the State a *franchise* tax which shall be in lieu of taxes upon all of its *other intangible property* and *in lieu of property taxes* on its rolling stock." (Emphasis added)

The word "other" leaves no room for doubt as to what is being taxed—property! Because under the decision of this Court, it was clear that the Legislature had "misconceived what it was taxing", the Legislature reconsidered what it was taxing and clearly levied a property tax. The "trinity of characterizations" no longer exists and the intention of the Legislature, to levy a property tax in lieu of taxes on other property, becomes manifest.

The tax is not made a condition precedent to the right to carry on business, but its enforcement is left to the ordinary means devised for the collection of taxes, demonstrating that it is not a license or privilege tax. (*Postal Tele. Cable Co.* v. *Adams*, 155 U. S. 688.)

As was said in the dissenting opinion in the prior case (347 U. S. 359, at page 369):

> "The tax in question is nondiscriminatory, fairly apportioned, and not excessive."

B.

The Appellant's Virginia Activities

The evidence reveals that the appellant permits its property to be used in intrastate commerce in Virginia by its wholly owned subsidiary, and for that use it receives all of its subsidiary's receipts. In addition, it is clear that it, and its subsidiary, use the same facilities, the same equipment,

the same supplies, even the same bills of lading. The employees are "joint employees". The appellant pays or bears all costs or expenses including all operating expenses of the Virginia Company. In other words, the appellant totally owns the Virginia Company, receives all its revenues and pays all its bills. Certainly, it is clear that the Virginia Company is merely a corporate shell admittedly created to satisfy Section 163 of the Constitution of Virginia. These facts were not considered by this Court in the prior case, and distinguish this case from the prior decision. The use of its property intrastate in Virginia clearly provides a basis for the Virginia tax against the appellant.

C.

The Amount of the Tax

1.

The Method of Determining the Tax

Appellant contends that it "had no way of determining and was, therefore, unable to report for taxation the amount of its gross receipts earned 'in business passing through, into or out of' Virginia, as required by § 58-547." In spite of the fact that appellant insists that it has no way of determining what is correct, it strenuously maintains that the assessment against it is incorrect.

This contention would seem to answer itself, for, if the appellant has *no way* of determining the correct answer, obviously it has no way of proving the Virginia assessment to be incorrect. However, there are other answers to this contention, as the Supreme Court of Appeals of Virginia said in its opinion in this case:

> "Section 58-547 does not undertake to prescribe the method of ascertaining the amount of these gross re-

ceipts. Sections 58-548 and 58-549 do that. The primary method is for the express company to report what these receipts are. Nobody else could as easily obtain that information. The secondary method is not needed unless the express company fails to furnish the information, which happened here. In that event the Commission is required to make the assessment on the best and most reliable information it can get. * * *"

"* * * For years prior to 1954 the appellant reported to the Commission the amount of its gross receipts or agreed to the amount fixed by the Commission. For 1956 it reported, as stated, that it had no way of determining its gross receipts from interstate business in Virginia and that it kept no books from which it could ascertain such gross receipts and the cost of doing so would have been prohibitive, but without any supporting evidence to explain how much and why. The Commission thereupon ascertained in the best way it could the amount of these gross receipts to be $6,499,519. *If that was too much and if there was included in the calculation, as appellant contends, the value of property outside of Virginia, it was the duty of the appellant to present evidence to show what reduction should be made, or to have explored the possibility of an agreement about it as in prior years (Railway Express Agency, Inc., v. Commonwealth,* 194 Va. 757, 75 S. E. 2d 61).

"There is no evidence in the record as to the relation between the Company's property and its revenues in other States. Code § 58-672 and § 58-1122 provide ample means for correcting excessive assessments. *Clearly the burden was on the appellant to produce evidence to show in what way and to what extent the assessment made by the Commission was too much.* It did not do so but centered its attack on the constitutionality of the taxing statute. We take the finding of value by the Commission as *prima facie* correct, Constitution § 156(f). *It is not incredible that a prop-*

erty which produced gross earnings of $6,000,000 in one year would have a value of that much." (Emphasis added)

The failure of the appellant to produce evidence in the State tribunals to support its claim is sufficient reason for this Court to deny a review of the State decision.

In spite of its failure to produce any evidence to support its claim, the appellant seeks to argue before this Court that the Virginia assessment is "unrealistic" because 1.7% of its total gross revenues is attributed to Virginia, whereas it says that there is located in Virginia only about 0.6% of its total assets of like class as those located in Virginia. The appellant's mathematics appear to be greatly in error, and, indeed, at pages 8 and 18 of the Statement as to Jurisdiction, it contradicts itself. On page 8, it lists the various classes of property owned by it in Virginia as totaling $458,565.16 as compared with a nationwide system value of the same classes of property of $79,700,426. On page 18, while using the same nationwide system value, the "like" Virginia located property has grown to $475,665.00 (a discrepancy of over $17,000, or a little over 3%). More important, however, is the fact that neither of the figures shown for the value of property located in Virginia includes any value for the ownership of the Virginia Company. Obviously, this omission will greatly distort the statistics.

The fallacy in appellant's statistical approach is immediately apparent. In Virginia, appellant enjoys the joint use of property with the so-called Virginia Company. With regard to its property located in Virginia, by merely placing title to all its tangible personal property, office furniture, equipment and real estate in the Virginia Company—which it wholly owns and controls—the appellant could realize the same earnings in Virginia and have an even smaller per-

centage of its total property Virginia owned. One big asset of the appellant is the Virginia Company. The joint use of trucks, buildings, employees, etc., makes it easy for appellant to earn tremendous sums in Virginia without the ownership of property.

The claim that 1.7% of its revenues was derived in Virginia the appellant brands as "unrealistic", but the evidence showed that the total mileage covered by the appellant, by rail, steamboat, motor carrier or miscellaneous was 306,624, and that 6,118.90 miles of that is in Virginia. Over 1.9% of its total mileage is in Virginia. How can it be unrealistic to say that 1.7% of its revenue was derived in Virginia? — Express companies make money on the basis of the mileage involved, not on the basis of the value of the tangible property owned, and the contract right to move express over these 6,118.90 miles is valuable property, especially so when over most of the mileage the appellant enjoys an absolute monopoly.

Appellant further sought to demonstrate mathematically that the going concern value attributed to its properties is so disproportionate as to "over-tax our credulity". It does so by the simple device of assuming for purpose of computing going concern value a false tax rate of ½ of 1% (50¢ on $100.00 in value).

This is extremely misleading BECAUSE THE INTANGIBLE PROPERTY OF THE APPELLANT IS NOT TAXED AT THE RATE OF ½ of 1%. The Legislature of Virginia has seen fit to tax the intangible value of express companies at a rate of 2.15%. It is obvious that the value required to result in the amount of tax involved here will be $6,499,519 (the gross receipts).

$$\text{Value} \times \text{Tax Rate} = \text{Tax}$$

or

$$\text{Tax} \div \text{Tax Rate} = \text{Value}$$

The Legislature has merely measured value by gross receipts and the use by appellant of a tax rate less than ¼ as great as the applicable rate will obviously reflect a value more than four times as great as the value determined by the legislative procedure.

The appellant uses this same erroneously determined value of $28,000,000.00 to argue that it has no property "in lieu" of which this assessment could be made.

There is one item of intangible personal property about which the appellant has said very little in this case. It appears from the record that the appellant *owns* a contract which entitles it to the exclusive express privilege on 177 railroads in the United States and express privileges on a number of truck lines, air lines and steamboat lines. Many of them operate in Virginia. What is the value of this "intangible" property?

This we do not know. We do know that based on the proportion of Virginia mileage to system mileage the privilege on the six major railroads and five air lines, earned gross revenues in Virginia of $6,499,519 in one year. The Legislature has concluded that only by determination of revenues can we reach the value of such a corporation's property. We must assume that in fixing the rate of tax the Legislature was well aware that it was levying a tax to be measured by gross receipts rather than net income, and that it set the tax rate much lower than would have been the case if they had been basing the tax on net income.

The ownership by the appellant of these exclusive contract rights with various carriers in Virginia could be made the subject of a contract tax in Virginia. However, Virginia in the exercise of its discretion has determined to impose a franchise tax measured by gross receipts "in lieu" of such

a tax on this and other intangible property and on rolling stock. This action of the General Assembly has been found by the State Corporation Commission and the Supreme Court of Appeals as being consistent with the intent and purpose of the State Constitution, and further both of these judicial bodies have found the operation of the tax inoffensive under the Constitution of the United States.

III.

CONCLUSION

For the foregoing reasons, the appellee respectfully submits that the question upon which the decision of this case depends is so unsubstantial as not to need further argument, and the appellee respectfully moves the Court, therefore, to dismiss the appeal.

Respectfully submitted,

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